

21 THE PROMISE AND REALITY OF ONLINE DISPUTE RESOLUTION IN AUSTRALIA

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1 INTRODUCTION

It is clear that Online Dispute Resolution (ODR) has grown significantly in response to local and international factors within Australia over the past decade. This growth is partly attributable to a healthy Alternative Dispute Resolution (ADR) environment within Australia. The use of ADR in Australia is widespread and all Courts and Tribunals now have the power to mandatorily refer disputes to ADR processes. In addition, many disputants are required to use ADR processes before commencing Court or Tribunal proceedings so there is also a healthy pre court ADR environment. A robust e-environment has also assisted to expand the reach of ODR and this will expand further as the national broadband plan becomes fully operational.¹ As with other jurisdictions, at times the growth in ODR has been in response to non domestic factors such as a growth in cross border transactions and general borderless online consumer activity.

One of the most significant domestic changes in Australia is linked to the Web 2.0 approach where government and others are adapting policy and processes on an unprecedented scale to take advantage of new technologies and better connectivity. Although these processes may not support full stand alone ODR environments (at least initially), they do enable supportive environments to be constructed. In addition, many Australian ADR environments now use Facebook, Twitter and YouTube to engage with business, consumers and stakeholders about dispute resolution and to support dispute avoidance and self managed negotiation strategies.²

However, the rate of growth of ODR has not been as fast as some may have predicted in the early 2000s in Australia. At that time, it was predicted that ODR would be taken up and used by a significant proportion of the Australian population by the end of the decade. After conducting a survey in 2003, Conley Tyler and Bretherton concluded that: "There is demand for online ADR among more than 70% of potential users"³ and it did not seem

1 <www.dbcde.gov.au/broadband/national_broadband_network>, last accessed 30 May 2011.

2 <<http://gov2.net.au/blog/2009/12/31/guest-post-the-victorian-department-of-justice-and-web-2-0/#more-1750>>, last accessed 30 May 2011.

3 <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1250&context=adr>>, last accessed 30 May 2011.

unrealistic to assume that this would translate into significant growth in ODR. Despite this early optimism, it is fair to say that exponential growth rates have not been achieved in the ODR field and that only gradual, although significant, ODR initiatives have been undertaken within Australia. It is also clear that as broadband speed and internet infiltration has increased so have the options and processes available within the ODR environment within Australia.

Some of the early opportunities for ODR were discussed by NADRAC (a leading government ADR agency in 2002) and this chapter charts not only the growth in actual ODR but also the growth in ODR research and evaluation within Australia:

Information technology provides opportunities to facilitate communication and so assist in prevention and management of disputes ... to provide information to parties and to complement, or substitute for, traditional face to face interventions.⁴

Within Australia and in this chapter, ODR has been used to refer to dispute resolution processes conducted with the assistance of communications and information technology, particularly the internet.⁵ ODR can include facilitative processes such as online mediation, advisory processes such as online case appraisal and determinative processes such as online arbitration or adjudication. Using the NADRAC definition, it also includes processes conducted through a computer program or other artificial intelligence that do not involve a "human" practitioner.

2 GROWING ODR SPECIFIC SCHOLARSHIP

It is evident that there are considerable amount of literature and academic leadership regarding several aspects of ODR in Australia. In this respect, Australian researchers have paid attention to different aspects of issues connected with ODR.⁶ These include legal

4 National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution and Information Technology Principles for Good Practice (Draft.)* 2002, p. 2, <[http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~Principles+on+Technology+and+ADR.doc.pdf/\\$file/Principles+on+Technology+and+ADR.doc.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~Principles+on+Technology+and+ADR.doc.pdf/$file/Principles+on+Technology+and+ADR.doc.pdf)>, last accessed 11 June 2011.

5 M. Conley-Tyler and D. Bretherton, "Seventy-Six and Counting: An Analysis of ODR Sites", Report of Research Conducted for the Department of Justice, Victoria, Australia 2003, <<http://www.odr.info/unece2003/pdf/Tyler.pdf>>, last accessed 30 May 2011.

6 E. Clark and G. Cho, "Law and Technology: What Does the Future Hold for ADR?", *Journal of the Institute of Arbitrators and Mediators Australia*, (2001) Vol. 20, No. 3, pp. 1-25, <www.iama.org.au/pdf/jlv20n03.pdf>, last accessed 11 June 2011.

issues,⁷ accreditation issues,⁸ effectiveness of non litigation-based redress methods,⁹ technological issues connected with ODR,¹⁰ online dispute resolution and family disputes,¹¹ ODR and the government sponsored courts,¹² building client confidence in ODR,¹³ issues associated with the enforceability of online arbitration agreements in the commercial arbitration context,¹⁴ development of negotiation support systems¹⁵ and barriers to ODR.¹⁶

In addition, Australia is fortunate to have much experimental work in the field of AI that has been sponsored and promoted by Australia's primary University funding body – the Australian Research Council. This important work has not only led to the “building” of AI systems in the ODR environment but has also led to the testing, research and extension of these systems and has been pioneered by Zeleznikow.

As far as government's contribution to the development of ODR is concerned, there are several government-sponsored national bodies which are involved in the development of ODR. For example, they include the Australian Law Reform Commission (ALRC), and dispute resolution organizations.¹⁷ As noted previously, some aspects of ODR have been addressed in several reports of National Alternative Dispute Resolution Advisory Committee (NADRAC). For example, the *On-line ADR Background Paper* in 2001¹⁸ and the *Resolve*

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- 7 E. Wentworth, “Online Dispute Resolution: Global Issues and Australian Standards”, *Journal of the Institute of Arbitrators and Mediators Australia*, (2002) Vol. 21, No. 2, pp. 21-37, <www.iama.org.au/publications.htm>, last accessed 30 May 2011.
 - 8 M. Conley-Tyler and J. Bornstein, *Accreditation of Online Dispute Resolution Practitioners*, Paper, <<http://www.mediate.com/odresources/docs/ODR%20Accreditation.doc>>, last accessed 30 May 2011.
 - 9 D. Gawith, “Non Litigation-Based Redress for International Consumer Transactions is Not Cost Effective – A Case for Reform?”, *Macquarie Journal of Business Law*, (2006) Vol. 3, pp. 115-150, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401092>, last accessed 30 May 2011.
 - 10 A.R. Lodder and J. Zeleznikow, “Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model”, *Harvard Negotiation Law Review*, (2005) Vol. 10, pp. 287-337, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008802>, last accessed 12 June 2011.
 - 11 M. Conley-Tyler and M. McPherson, “Online Dispute Resolution and Family Disputes”, *Journal of Family Studies*, (2006) Vol. 12, No. 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032743&rec=1&srcabs=934947>, last accessed 30 May 2011.
 - 12 B. Tamberlin, *Online Dispute Resolution and the Courts*, Paper 2005, <<http://www.odr.info/unforum2004/tamberlin.htm>>, last accessed 11 June 2011.
 - 13 L. Goldacre, “Building Client Confidence in ODR: How Effective is the New Privacy Legislation for Cyberspace?”, *ADR Bulletin*, (2002) Vol. 5, No. 7.
 - 14 R. Garnett, “The Enforceability of Online Arbitration Agreements”, *Australasian Dispute Resolution Journal*, (2004) Vol. 15, No. 4, pp. 239-247.
 - 15 J. Zeleznikow, *Beyond Interest Based Bargaining – Incorporating Interests and Justice in the Development of Negotiation Support Systems*, 2010, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADRResearch_SummaryPapersfromADRResearchForum2010>, last accessed 30 May 2011.
 - 16 T. Sourdin, *Alternative Dispute Resolution*, (3rd ed.), Sydney, Thomson Reuters, 2008, pp. 218-225.
 - 17 Telecommunications Industry Ombudsman, <www.tio.com.au/publications/TIO_talk_issues/30/30.6.htm#onlineadr>, last accessed 30 May 2011.
 - 18 NADRAC, *On-line ADR, Background Paper*, 2001, pp. 14-16, <[http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~ADR.rtf/\\$file/ADR.rtf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~ADR.rtf/$file/ADR.rtf)>, last accessed 11 June 2011.

to *Resolve-Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* in 2009¹⁹ provide an overview of ODR together with advantages, disadvantages and barriers to the development of ODR. In addition, there are several specific research reports which focus on online ADR.²⁰

In terms of empirical research there has been some work conducted. Sourdin's work in regards to digital divide²¹ and Conley Tyler's analysis of ODR sites and services²² are examples that can be mentioned in this respect.²³ However, in general, there is no considerable body of research that has been conducted empirically in Australia in respect of ODR. For example, NADRAC has noted that "The paucity of (especially empirical) data in ADR generally is accentuated when it comes to on-line ADR"²⁴.

In some important ODR areas there is an almost complete lack of literature or research. For example, in relation to online business to consumer electronic commerce (B2C e-commerce), online consumer arbitration (OCA), and the enforcement of online consumer arbitration awards (OCA) there is little information or analysis.

Overall, although Australia is slowly but steadily contributing to enrich global ODR literature by addressing various aspects of ODR from both local and global perspective it is clear that Australian literature is quite limited in terms of some aspects of ODR. This is an area of significant potential growth into the future.

3 ODR IN THE GOVERNMENT SECTOR

The development of ODR is recognized not only in international forums but has also been recognized in the domestic Australian governmental arena. In the international sector, the Fourth UN Forum on Online Dispute Resolution Report and Recommendations has influenced ODR approaches at a worldwide level.²⁵

19 NADRAC, "The Resolve to Resolve Embracing ADR to Improve Access to Justice in the Federal Jurisdiction", Report to the Attorney – General 2009, <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_TheResolvetoResolveEmbracingADRtoimproveaccesstojusticeinthefederaljurisdiction>, last accessed 11 June 2011.

20 See NADRAC 2002.

21 See T. Sourdin, *ODR – An Australian Perspective on the Digital Divide*, Paper, 2005, <www.endispute.com.au/wpdl/ODR%20an%20Australian%20Perspective.pdf>, last accessed 30 May 2011.

22 See M. Conley-Tyler, *115 and Counting: The State of ODR*, Paper, 2004 <www.odr.info/unforum2004/ConleyTyler.htm>, last accessed 30 May 2011.

23 See M. Conley-Tyler and D. Bretherton, *Developing an Online Mediation Culture: the Fourth Generation of Online ADR*, Paper, International Conflict Resolution Centre, University of Melbourne, <www.apmec.unisa.edu.au/apmf/2003/papers/tyler.pdf>, last accessed 30 May 2011.

24 NADRAC 2001, p. 3.

25 E.g. some of the following recommendations incorporated in the Fourth UN Forum on Online Dispute Resolution Report and Recommendations can be cited:

- Emphasize the importance of governmental support and recognition of ODR systems;
- Promote cooperation and joint projects amongst ODR providers;

In the domestic Australian sector, an “institutional” phase has been recognized as the fourth development stage of ODR.²⁶ An “institutional” phase includes the increasing engagement of government institutions and this stage can accordingly be distinguished from earlier “hobbyist”, “experimental” and “entrepreneurial” phases.²⁷

In fact, the engagement of institutions in the “institutional” phase indicates that ODR is increasingly regarded as a promising dispute resolution phenomenon within Australia. In this regard, the government sector in Australia has, at least in some sectors, recognized and has been utilizing ODR as a viable dispute resolution mechanism. For example, the *Alternative Dispute Resolution in Victoria: Supply-Side Research Project* identified institutions that could use and incorporate ODR strategies such as Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission, and Victorian Civil and Administrative Appeals Tribunal.²⁸ The report noted that: “The online dispute resolution service uses a step-by-step process that provides consumers with information about a range of possible dispute resolution strategies.”²⁹

More recently, this has translated into institutional action at state and federal levels and two specific examples of government sites that offer a supported ODR environment (although not fully ODR oriented) are detailed below.

3.1 *Dispute Settlement Centre of Victoria (DSCV)*

Although not a full online program, the DSCV program indicates how web based material can be used to supplement, support and at times replace more traditional forms of ADR.

In 2010, the DSCV introduced a supported online information package directed at disputants in neighbourhood conflicts.³⁰ The online information features online videos, web linked resources, and associated material to assist in the direct resolution of disputes and to support the provision of face to face dispute resolution services. One of the underlying rationales behind the development of DSCV Scheme is to settle disputes by using non-adversarial dispute resolution mechanisms such as mediation in order to minimise

– Support the use of ODR in court litigation in order to reduce any existing case backlog; M.S.A. Wahab, *The Fourth UN Forum on Online Dispute Resolution Report and Recommendations*, 2006, p. 10, <www.crcica.org/ODR_Report.pdf>, last accessed 11 June 2011.

26 See Conley-Tyler & Bretherton (2003), p. 5; see W. Zhang and J. Zeleznikow, *An Integrative Approach for Developing Online Dispute Resolution*, 2004, <www.iadis.net/dl/final_uploads/200406L013.pdf>, last accessed 30 May 2011.

27 See Conley-Tyler (2004); see Conley-Tyler & McPherson (2006), p. 7.

28 C. Field, *Alternative Dispute Resolution in Victoria: Supply-Side Research Project*, Research Report (2007), p. 32, <[www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/cav_report_adr_supply_side_research_2007.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_adr_supply_side_research_2007.pdf)>, last accessed 11 June 2011.

29 Field, (2007), p. 32.

30 See <<http://www.disputes.vic.gov.au/reachingagreement/>>, last accessed 30 May 2011.

delay, cost and complexity.³¹ This scheme is designed to overcome communication and cultural barriers as well, and the web based material is available in a range of languages and with comment board posting.³² The types of disputes supported by the DSCV could vary from complex disputes to small disputes.³³ The availability of Interpretation facilities is also an additional benefit to the disputants.³⁴ In addition to the web based “do it yourself” material, the Department of Justice in Victoria provides a Dispute Resolution Advisory Service available over the phone in terms of advice for the prevention and resolution of disputes.³⁵ Although this service does not provide a fully online service as yet, it is clear that the online services, and in particular the comprehensive range of videos (that are also available on YouTube), support negotiation and ADR use that can take place using more traditional meetings.

3.2 Consumer Affairs Victoria (CAV)

CAV also provides a partial ODR environment. Not only does it provide full support packages for those involved in consumer disputes, it also provides for lodging of complaints in an online environment.³⁶

As far as the role of the CAV is concerned, the Goals of Consumer Affairs Victoria are:

- empowering consumers;
- creating a competitive, fair and safe trading environment;
- protecting vulnerable and disadvantaged consumers;
- building our organisational capability.³⁷

31 Various types of such disputes have been listed on the web site of the Department of Justice, Victoria, Australia, Dispute Settlement Centre of Victoria, <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+%28About+Us%29>>, last accessed 30 May 2011.

32 See note 33.

33 *Id.*

34 Australian Competition & Consumer Commission, Department of Justice, Dispute Settlement Centre of Victoria (DSCV), Description, <www.accc.gov.au/content/index.phtml/itemId/287185/fromItemId/815972/quickLinkId/816515/whichType/org>, last accessed 12 June 2011.

35 Department of Justice Victoria (DJV), Australia, Services Available from the Department of Justice, <www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Find/Services/>, last accessed 30 May 2011.

36 See Consumer Affairs Victoria, Make a complaint, <www.consumer.vic.gov.au/CA256EB5000644CE/page/About+us-Contact+us-Make+a+complaint?OpenDocument&1=0-About+us~&2=060-Contact+us~&3=030-Make+a+complaint~>, last accessed 30 May 2011.

37 Consumer Affairs Victoria (CAV), Who we are and what we do, <www.consumer.vic.gov.au/CA256EB5000644CE/page/About+us-Who+we+are+and+what+we+do?OpenDocument&1=0-About+us~&2=010-Who+we+are+and+what+we+do~&3=~>>, last accessed 30 May 2011.

In line with these goals, Consumer Affairs Victoria works for the protection of consumer rights. From an online consumer perspective, services such as “shopping over the Internet” and “any current consumer scams and how to avoid them” are provided by the CAV. It has different dispute resolution mechanisms which are primarily facilitative, conducted via both online facilities and offline methods. For example, conciliation is conducted by methods such as “telephone”, “email”, “letters” and “face-to-face meetings”.³⁸ ADR mechanisms are used for the resolution of disputes between traders and consumers and tenants and landlords.³⁹

As with some other schemes, CAV is also using technology to maintain contact with consumers. The 2010 Annual Report noted that:

In May, Consumer Affairs Victoria launched on Twitter. We now tweet court outcomes, consumer alerts, media releases, advice and tips to help consumers, traders and industry. Twitter enables us to disseminate information quickly and connect with some target markets that were traditionally hard to reach.⁴⁰

4 IMPLICATION FOR COURTS

Within Australia ODR growth in most sectors has been primarily directed at e-commerce and consumer-based schemes that operate as first-tier complaints handling and dispute resolution mechanisms. The growth in these schemes in recent years has been immense and there are now a number of examples of processes that are available to resolve disputes that have arisen as part of an online transaction.⁴¹

Those within the litigation system have noted that technology changes have the potential to dramatically transform the way in which dispute resolution is carried out.⁴² Within the court system, e-callosers,⁴³ e-filing,⁴⁴ videoconferencing and applications⁴⁵ are now commonplace in many jurisdictions. Technology courts, virtual courts or cyber courts

38 Consumer Affairs Victoria, Resolve a dispute, <<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/About+us-Contact+us-Resolve+a+dispute?OpenDocument&1=0-About+us~&2=060-Contact+us~&3=020-Resolve+a+dispute~>>, last accessed 30 May 2011.

39 Consumer Affairs Victoria.

40 Consumers Affairs Victoria, Informed Consumers. “Responsible Traders”, Annual Report 2009–2010, p. 40, <http://annualreport.consumer.vic.gov.au/pdf/CAV_AR_web_combined.pdf>, last accessed 11 June 2011.

41 See Department of Justice, Victoria.

42 Australian Law Reform Commission (ALRC), “Review of the Adversarial System of Litigation. Technology – What it Means for Federal Dispute Resolution”, *Issues Paper 23*, Canberra, ALRC, 1998.

43 *E.g.* New South Wales Land and Environment Court.

44 *E.g.* Federal Court of Australia.

45 Bail applications are commonly carried out by video in the Supreme Court of New South Wales.

now exist in many jurisdictions⁴⁶ and the presence of such initiatives may produce more participatory court processes as well as better communication and document management. Other changes have occurred in the handling, collation and storage of information and in the way that research occurs. The information that is available online increases access to court systems and can assist parties to observe and understand what takes place within the court system.

While many technology and virtual courts do not necessarily support ADR processes, some do and some envision that this will become an increasingly important way to deliver ADR services to the community. The Federal Court of Australia, for example, developed the eCourt forum as early as 2001.⁴⁷

The eCourt forum “is a virtual courtroom that assists in interlocutory matters and allows for directions and other orders to be made online”.⁴⁸ Referring to the eCourt forum Justice Brian Tamberlin further notes that “It may also be used in mediations, where these are directed by the Court and conducted by one of the registrars”.⁴⁹ The eCourt enables updated online conversations to take place and protocols have been developed to assist users and the court. The eCourt breadth is outlined more fully in the following section.

4.1 *Federal Court of Australia*

The e-court concept is not new to ODR. For example, there are the virtual magistrate, e-court concepts in Singapore,⁵⁰ small claim courts and virtual court room in Sydney.⁵¹ The Australian Federal eCourt program is an advanced e-court program that is equipped with a range of new technologies. Parties to a dispute are no longer required to go to the court; instead, they can participate in the court proceedings via technology, access e-documents, check the status of a matter (online) and exchange documents and make submissions in a protected and confidential e environment.

As part of the e-court strategy the Court currently provides the following services online:

- *eLodgment* enables any member of the public, whether they be practitioners, law firms, corporate bodies or self represented litigants electronically lodge documents with the

46 See <www.judiciary.gov.hk/en/crt_services/tech_crt.htm>, last accessed 30 May 2011.

47 See <www.fedcourt.gov.au/ecourt/ecourt_slide.html>, last accessed 30 May 2011; see Tamberlin (2005).

48 Tamberlin (2005).

49 *Id.*

50 A similar advanced online court service is offered by the Singaporean Subordinate Courts. S. Schiavetta, Online Dispute Resolution, E-Government and Overcoming the Digital Divide, 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World?, 2005, p. 3. <www.bileta.ac.uk/Document%20Library/1/Online%20Dispute%20Resolution,%20E-Government%20and%20Overcoming%20the%20Digital%20Divide.pdf>, last accessed 30 May 2011.

51 See Sourdin (2008), p. 228.

- Federal Court of Australia and the Federal Magistrates Court of Australia. eLodgment may be used to commence an action in either jurisdiction by enabling the lodgment of initiating documents and any supporting documents. Similarly, documents pertaining to existing matters may be lodged via eLodgment as long as the file number is known.
- *Federal Law Search* allows the public to search for information on specific cases.
 - *eCourtroom* allows parties and their legal representatives to participate in a virtual courtroom. The virtual courtroom assists in the management of pre-trial matters by allowing directions and other orders to be made online by the relevant docket Judge.
 - The Court’s *eCase Administration* is a service that may be used by practitioners or parties to communicate with chambers’ staff, on case related issues, in a secure environment. Only parties to the matter or their legal representatives will have access to this service and access is restricted to those matters where they are a participant in the proceedings. It is in essence an effective case management tool for both chambers and the participants in the matter.
 - The *Commonwealth Courts Portal* is an initiative of the Federal Court of Australia, the Family Court of Australia and Federal Magistrates Court of Australia. It provides web-based services to judicial officers, lawyers, litigants and court staff providing real-time information about cases before the courts. Users can obtain a composite, user friendly view of their cases that provides information about documents filed and scheduled listing events, as well as details of any orders made.⁵²

Interestingly, there are some important measures taken for the purpose of networking of courts in Australia that support basic ODR support services. For example, the Commonwealth Court Portal (CCP) networks three courts such as Family Court of Australia, Federal Court of Australia and Federal Magistrates Court of Australia by allowing “free web-based access to information about cases before these courts”.⁵³ CCP is designed to deliver the following services:

- a view of court information designed specifically to suit the users’ needs;
- the ability to search for relevant information held by the three courts;
- access for lawyers to case information from the convenience of their own office;
- control and administration of this access by the law firm in which they work;
- secure access to information for self represented litigants, and
- the ability to eFile applications for divorce and family law supplementary documents.⁵⁴

52 Federal Court of Australia, eCourt, <www.fedcourt.gov.au/ecourt/ecourt_slide.html>, last accessed 30 May 2011; see Tamberlin (2005); see Sourdin (2008), pp. 230-231.

53 Family Court of Australia, Commonwealth Courts Portal, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/eservices/CCP/>, last accessed 30 May 2011.

54 Family Court of Australia, Commonwealth Courts Portal.

One of the fundamental objectives of CCP is to increase the efficiency of court proceedings. For example, the Commonwealth Court Portal, which was launched in 2007,⁵⁵ exists “to maximise efficiency for the user by establishing a common technological framework”.⁵⁶ This efficiency is enhanced as CCP provides “a gateway to a broad range of services and information available from all three courts”.⁵⁷ In line with this objective, CCP recognizes several benefits, for example:

- streamlined and integrated delivery of Commonwealth court services;
- single sign on for multiple services in multiple jurisdictions;
- single sign on for streamlined help desk and administration support;
- improved information management and consistent reporting; and
- improved service delivery through feedback.⁵⁸

It is generally accepted by the Australian courts that there are positive aspects of using eCourts for the resolution of disputes. For example, two major advantages of having electronic courts have been indicated in the Australian case of *Harris Scarfe & ORS v. Ernst & Young & ORS* that: “First and foremost is the reduction in trial time, which I consider is likely to be substantial”.⁵⁹ The court further stated that “The collective costs of each day that the trial continues [...] will be substantial, and even a minor reduction in the length of the trial will deliver significant cost savings”.⁶⁰

In addition, Australian court rules play an important role in supporting the development of eCourt strategy in Australia. For example, the Federal Court Rules made under the *Federal Court of Australia Act 1976* (Cth) support the legal basis for the operation of Federal eCourt in Australia.⁶¹ Other State based Courts have established similar rules.⁶²

Although there is a lack of specific legislation which applies across the states and territories of Australia in regards to the eCourt, Court rules are available allowing courts to

55 *Id.*

56 Commonwealth Courts Portal, <www.familycourt.gov.au/wps/wcm/resources/file/eb30d14dadd5a00/DLCCP_0908V1.htm>, last accessed 30 May 2011.

57 Family Court of Australia, Commonwealth Courts Portal.

58 *Id.*

59 *Harris Scarfe & ORS v. Ernst & Young & ORS* (NO 3) [2005] SASC 407, paragraph 19.

60 *Id.*

61 See P. Kellow, “The Federal Court of Australia: Electronic Filing and the eCourt Online Forum”, *University of Technology, Sydney Law Review*, (2002) Vol. 4, <www.austlii.edu.au/au/journals/UTSLRev/2002/8.html>, last accessed 12 June 2011.

62 *E.g.* Practice Note No. 1 of 2007, Guidelines for the Use of Technology in any Civil Litigation Matter, <www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/practice+and+procedure/practice+notes+_+statements/supreme+-+practice+note+no.1+of+2007+%28pdf%29>, last accessed 30 May 2011; see “The Family Law Rules 2004” which do envisage electronic filing (for example Rule 24.07). Family Court of Australia, *Family Court Bulletin* (FCB), (2008) No. 3, p. 7, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_December_08>, last accessed 27 September 2011.

regulate procedure of court within the existing legal framework.⁶³ It seems that these rules are flexible enough to develop e-court friendly rules by which courts can conduct proceedings in an electronic form. In this respect, Jackson points out three types of such rules in regards to the use of technology in litigation: practice notes, rules of courts, and the inherent jurisdiction of the Court.⁶⁴ Within Australia the existing legal authority in the framework of rulemaking power conferred on courts judges is sufficient for them to play a pivotal role in shaping eCourts in line with the technological innovations.

Arguably, apart from rule making power conferred on judges as discussed, cases such as *Idoport Pty Ltd v. National Australia Bank Limited*,⁶⁵ *Harris Scarfe & ORS v. Ernst & Young & ORS*,⁶⁶ *Australian Securities and Investments Commission v. Macdonald*⁶⁷ and *Richard Crookes Constructions Pty Limited v. F Hannan (Properties) Pty Limited*⁶⁸ where online court facilities were adopted can be considered as leading innovations which reflect not only the growth of the electronic courts strategy but also signify the legitimization of the eCourt strategy in Australia.

However, how the e-court reforms will impact on the development of private ODR mechanisms is debatable. It is questionable how far e-courts developments can be integrated into the development of private ODR in Australia for a range of reasons. The positive aspects of eCourt initiatives in terms of time and cost may be relevant to large volume cases, but it is questionable whether similar benefits can be achieved in private ODR cases where small volume or small dollar e-commerce cases are involved. For example, legal perspectives as to the sharing of the cost for electronic court facilities⁶⁹ can be problematic as affordability of cost associated with the use of technology during the trial stage may be unrealistic from online consumer perspective. This burden of cost may be exacerbated if the online consumer has to pay for legal fees or fees for legal service. Additionally, the enforcement of final outcomes of the e-courts can also be questionable due to the lack of legal framework for the enforcement of e-judgments delivered by ODR mechanisms.

63 S. Jackson, "New Challenges for Litigation in the Electronic Age", *Deakin Law Review*, (2007) Vol. 12, No. 1, pp. 89-96; see Kellow (2002).

64 *Id.* "However, even in the absence of a specific authority of this kind in a practice direction or note, there are two potential sources of jurisdiction for the making of such orders: the rules of court, and the inherent jurisdiction of the Court."

65 *Idoport Pty Ltd v. National Australia Bank Limited* [6] [2000] NSWSC 338.

66 *Harris Scarfe & ORS v. Ernst & Young & ORS* (NO 3) [2005] SASC 407.

67 *Australian Securities and Investments Commission v. Macdonald* (No. 2) [2008] NSWSC 1020.

68 *Richard Crookes Constructions Pty Limited v. F Hannan (Properties) Pty limited* [2009] NSWSC 142.

69 See "Variable costs are to be borne by the parties on a 'user pays' basis. These include the costs of supplying PCs, monitors and standard software; the costs of subscribing to a hardcopy transcript, or an electronic transcript, service; the costs of in-court connection to a real time transcript service; the costs of remote access to the electronic courtroom; and the costs of technical support for the individual benefit of a party", *Australian Securities and Investments Commission v. Macdonald* (No. 2) [2008] NSWSC 1020, paragraph 2; see S. Jackson, "Keeping it Simple: Court-Provided Technology Brings the 'Electronic Trial' to the Ordinary Litigant", *Bond Law Review*, (2008) Vol. 20, No. 1.

5 ODR IN THE FAMILY SECTOR

It also seems clear that ODR is extending well beyond the resolution of electronic commerce disputes. This broader expansion is likely as international trends and perspectives continue to have an impact in all areas of law including in family law. Internationally, ODR in the family sector has been perceived as offering significant benefits:

The Committee Members recognize and honour that Online Dispute Resolution may be used on the entire spectrum of dispute resolution; from problem diagnosis, to promoting bilateral communication between parties, to arbitration and court-like or court processes. The Committee Members also recognize that Online Dispute Resolution may be applied in a wide range of disputes; from interpersonal disputes including consumer to consumer issues or marital separation; to interstate conflict.⁷⁰

Additionally the Canadian report on the Evaluation of the Distance Mediation Project notes that “Information and communication technologies can, indeed, be used to deliver family mediation services in a competent, safe, and appropriate manner”.⁷¹ A similar development has occurred in the US where online mediation is conducted in cases where “one parent has moved out of state and/or when there are concerns about past incidences of violence between the parties”.⁷² These statements indicate the broad areas where ODR could be useful.

In the Australian legal and dispute resolution scenario, the use of ODR mechanisms for the resolution of family disputes has been supported and is likely to develop further due to two factors. First, the development of laws which require most family disputes to be mediated through a family dispute resolution process as a mandatory requirement before resorting to the relevant Court,⁷³ and second, the increase in the use of technology

70 Internet Corporation for Assigned Names and Numbers (ICANN), Online Dispute Resolution Standards of Practice, <www.icann.org/ombudsman/odr-standards-of-practice-en.htm>, last accessed 30 May 2011.

71 C. Getz, “Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project”, *Report Prepared for: The British Columbia Mediator Roster Society*, (2010) Vol. I, p. vi, <<http://dine4good.com/files/dmp.pdf>>, last accessed 30 May 2011.

72 S.S. Raines and M.C. Tyler, *From e-Bay to Eternity: Advances in Online Dispute Resolution*, University of Melbourne Legal Studies Research Paper, No. 200, (2007), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955968>, last accessed 30 May 2011.

73 “Changes to the Family Law Act in 1995 (*Family Law Reform Act 1995* (Cth)) saw family mediation enshrined as a “primary dispute resolution” method – in other words, the first port of call before court action was taken. In 2006, the Commonwealth government passed legislation (effective 1 July 2008) to make mediation a mandatory prerequisite for anyone seeking a parenting order with the usual exceptions for people in violent relationships or other situations involving gross power imbalances”. E. Wilson-Evered, D. Macfarlane, J. Zeleznikow & M. Thomson, “Towards an Online Family Dispute Resolution Service in Australia”, 2010, p. 2, <www.odrandconsumers2010.org/wp-content/uploads/2010/06/3.2-Wilson_Towards_Online-1.pdf>.

in both formal courts and informal (ADR) dispute resolution mechanisms of the family disputes.

More relevant factors that support the use of ODR for the resolution of family disputes are that:

- i) the relevant family law-related legislation does not ban the use of online technology for conducting FDR online and in fact it is supported by legislative interpretation, and
- ii) if parties to a dispute are in remote locations they are currently supported in accessing FDR via ICTs⁷⁴ and developing forms of ODR.⁷⁵

ADR is now well established in the family dispute resolution area within Australia. The *Family Law Act 1975 (Cth)*⁷⁶ sets out arrangements relating to matters including divorce and matrimonial causes, parental responsibility for children, and financial matters arising out of the breakdown of *de facto* relationships and prescribes specialised arrangements for ADR processes.

In particular, section 60I of the *Family Law Act (Cth)* requires disputants engaged in parenting disputes to *make a genuine effort at resolution* before commencing court proceedings. There are several exceptions to this requirement, set out in subs 60I (9), which are intended to ensure that people will not be required to attend ADR in a limited range

last accessed 12 June 2011; see “In 2006, the Australian Government introduced a series of changes to the family law system. These included changes to the *Family Law Act 1975 (Cth)* through the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* (*SPR Act 2006*) and changes to the family relationship services system”. R. Kaspiw, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu and the Family Law Evaluation Team, Australian Government Australian Institute of Family Studies, Evaluation of the 2006 family law reforms (2009), p. E1, <www.aifs.gov.au/institute/pubs/fle/>, last accessed 30 May 2011; see “Changes to the dispute resolution provisions of the *Family Law Act 1975* have been phased in since July 2007. These changes mean that where an individual wants to apply to the court for a parenting order they first need to attend family dispute resolution, and obtain a certificate from an accredited family dispute resolution practitioner confirming an attempt at family dispute resolution was made”, Australian Government Attorney-General’s Department, Family Dispute Resolution, <www.ag.gov.au/fdrproviders/>, last accessed 30 May 2011.

74 “FDR services are provided by a range of individuals and organisations, for example, Family Relationship Centres, community organisations, legal aid commissions, and individuals such as lawyers, social workers or psychologists. If you are in a remote area, you may access FDR services, for example, via telephone”. An Australian Government initiative, Family Dispute Resolution, <www.familyrelationships.gov.au/BrochuresandPublications/Pages/Family-Dispute-Resolution-Brochure-09.aspx>, last accessed 30 May 2011.

75 “Given the large geographic challenges faced in Australia, this factor alone is driving the use of this system. An ancillary benefit of using these technological systems is that the parties are not brought together in the same room at the same time; in disputes involving family violence, this is a major benefit of this system”. D. Bilinsky, ODR and Consumers, Report from the ODR Conference in Buenos Aires (2010), <www.odrandconsumers2010.org/2010/06/03/report-from-the-odr-conference-in-buenos-aires/>, last accessed 12 June 2011.

76 *Family Law Act 1975 (Cth)*.

of circumstances.⁷⁷ They include urgency,⁷⁸ inability to participate effectively,⁷⁹ family violence or child abuse,⁸⁰ and where the order sought is a consent order.⁸¹

The object of s60I is to ensure that all persons who have a parenting dispute make a genuine effort to resolve that dispute by ADR before applying to a Court.⁸²

This environment has led to a massive increase in ADR use in the family sector and a corresponding increase in interest in respect of ODR. ODR has been used in a variety of ways although perhaps the most simple use involves using online conferencing to replace face to face conferencing.

In this evolving phase of ADR in Australia, the utility of ODR as an effective mechanism of resolution of family disputes has been increased by the impact and spread of technology and broadband width. The increased use of the internet and the spread of computers into family homes naturally supports ODR use in the family setting as issues of cost, time, and flexibility dissipate. It is recognised that the use of ODR for the resolution of family disputes offers several advantages. Conley Tyler and McPherson have indicated the potential application of ODR for the resolution of family disputes:

- facilitating negotiations about property and maintenance issues;
- facilitating negotiations about parenting;
- assisting parties to develop their negotiation strategies;
- providing mediation and other primary dispute resolution services online;
- supporting face-to-face dispute resolution through the use of videoconferencing, teleconferencing and e-mail;
- supporting face-to-face dispute resolution through document drafting and other collaboration tools
- allowing for the exchange of information and the storage of data applicable to the settlement of property and financial interests or in order to manage ongoing parenting arrangements.⁸³

In this context it is important to explore how far technology-driven ODR and/or technology has been utilised for the resolution of family disputes in Australia.

The *Family Relationship Services System* includes several technology-driven services. First, “the Family Relationship Advice Line (FRAL)”⁸⁴ is a national telephone service giving

77 Explanatory Memorandum, Family Law (Shared Parental Responsibility) Amendment Bill 2006 (Cth), 21.

78 *Family Law Act 1975* (Cth), paragraph 60I (9) (d).

79 *Family Law Act 1975* (Cth), paragraph 60I (9) (e). This exception contemplates a range of circumstances that could establish inability to participate effectively.

80 *Family Law Act 1975* (Cth), paragraph 60I (9) (b).

81 *Family Law Act 1975* (Cth), subparagraph 60I (9) (a) (i).

82 Part VII orders include parenting orders and child maintenance orders.

83 Conley-Tyler and McPherson (2006), p. 17.

84 Kaspiew *et al.* (2009), p. 35.

free information and advice on family relationship or separation issues.⁸⁵ People who have physical impairment such as deafness, hearing impairments or speech pathology issues can use a National Relay Service which can be accessed via textphone or modem, voice only systems and through computers with an Internet connection.⁸⁶ Second, “Family Relationships Online (FRO)”⁸⁷ service “provides all families (whether together or separated) with access to information about family relationship issues, ranging from building better relationships to dispute resolution”.⁸⁸ Moreover, Family Dispute Resolution Conference conducted by the Legal Aid entities have for many years used telephone conferencing facilities to settle family disputes.⁸⁹

Another interesting or noteworthy development is the use of online technology such as the Integrated Multi-agent Online Dispute Resolution Environment for the improvement of negotiation support systems for the resolution of family law disputes.⁹⁰

The development of negotiation support systems for facilitating the mediation process used for the resolution of family disputes can be considered as a technologically driven AI process. These negotiation systems include Split-Up, Family_Winner and AssetDivider:

In the domain of Australian Family Law, Split-Up provides advice about BATNAs, whilst Family_Winner and AssetDivider employ decision analysis techniques and compensation/trade-off strategies to facilitate resolution of the dispute. Conceivably, Online Family Dispute Resolution Service could consider the provision of advice not only about outcomes and BATNAs, but also about processes and how disputants should act “fairly” and “reasonably” during the mediation.⁹¹

85 An Australian Government Initiative, The Family Relationship Advice Line, <www.familyrelationships.gov.au/Services/FRAL/Pages/default.aspx>, last accessed 30 May 2011.

86 *Id.*

87 Kaspiew *et al.* (2009), p. E1.

88 An Australian Government Initiative, Services to Support Families, <www.familyrelationships.gov.au/>, last accessed 30 May 2011.

89 Legal Aid New South Wales, Family Dispute Resolution, <www.legalaid.nsw.gov.au/asp/index.asp?pgid=592>, last accessed 30 May 2011.

90 B. Abrahams, E. Bellucci & J. Zeleznikow, *Incorporating Fairness into Development of an Integrated Multi-agent Online Dispute Resolution Environment*, Springer Science+Business Media B.V. 2010, <www.springerlink.com/content/2j17774266830554/>, last accessed 30 May 2011.

91 Wilson-Evered *et al.* (2010), p. 5.

Interestingly, attention has been given to develop these systems⁹² to support the resolution of family disputes.⁹³ It is also clear that telephone dispute resolution service (FRAL) together with the Australian Government's Broadband Network can lead to greatly increased use of online family dispute resolution in the future.⁹⁴

In addition, the Family Court of Australia has been equipped with modern technology to assist it to support the resolution of family disputes. For example, the eFiling mechanism for divorce through the Commonwealth Courts Portal is an important development that also supports ODR in the family sector.⁹⁵ The Commonwealth Court Portal enables litigants, lawyers and law firms to file supplementary documents-related to family law matters.⁹⁶ In this respect, a number of users are now engaged or active in this portal:

Since its launch in June 2008, use of the Commonwealth Courts Portal has doubled due to the inclusion of a federal law search facility.

At the end of March 2009, 560 law firms had registered for eFiling.

Approximately 4500 individual users have registered which include practitioners, members of the public, journalists, academics, judicial officers and staff of the courts.⁹⁷

Similar trends can be seen in other jurisdictions, such as the e-justice portal for the member states of the European Union.⁹⁸ The Subordinate Courts of Singapore also provides an interesting example to be considered when ODR or OADR is introduced to the mainstream justice system.⁹⁹ These technology-driven developments in the Family Court setting in

92 E. Wilson-Evered, T. Casey & S. Aldridge, *Readiness for online mediation: Application of a Modified Unified Theory of User Acceptance of Technology*, Paper, <[www.nadrac.gov.au/www/nadrac/rwpat-tach.nsf/VAP/\(9A5D88DBA63D32A661E6369859739356\)~Readiness+for+Online+Mediation+-+Wilson+E,+Casey+T+and+Aldridge+S.pdf/\\$file/Readiness+for+Online+Mediation+-+Wilson+E,+Casey+T+and+Aldridge+S.pdf](http://www.nadrac.gov.au/www/nadrac/rwpat-tach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~Readiness+for+Online+Mediation+-+Wilson+E,+Casey+T+and+Aldridge+S.pdf/$file/Readiness+for+Online+Mediation+-+Wilson+E,+Casey+T+and+Aldridge+S.pdf)>, last accessed 30 May 2011.

93 Wilson-Evered *et al.* (2010).

94 *Id.*, p. 10.

95 See Family Court of Australia, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/eservices/efiling/>, last accessed 30 May 2011; see Family Court of Australia, *Family Court Bulletin*, No. 6, 2010, p. 6, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_Jul_10>, last accessed 30 May 2011.

96 FCB 2008, p. 6.

97 Family Court of Australia, *Family Court Bulletin*, No. 4, 2009, p. 6, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_July_09>, last accessed 27 September 2011.

98 European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2008 (data 2006) Efficiency and Quality of Justice*, Council of Europe Publishing, p. 86, <<http://books.google.com/books?id=D9gghA1h3ooC&pg=PA84&dq=E-Justice:+Using+Information+Communication+Technologies+in+the+Court+System&cd=2#v=onepage&q&f=false>>, last accessed 7 June 2011.

99 R. French, Perspectives on Court Annexed Alternative Dispute Resolution, Law Council of Australia – Multi-Door Symposium (2009), p. 6, <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf>, last accessed 30 May 2011.

Australia may assist to further reduce the adversarial nature of the court proceedings.¹⁰⁰ However, it could not be said that the use of ODR has been fully embraced in the family dispute resolution system, or in the way envisaged more than a decade ago. Rather, ODR initiatives remain patchy and often conducted on a pilot basis. The benefits of ODR may be more obvious or extensive in Australia given the geographical isolation of many members of the community within the country. In addition, ODR may be particularly useful where there are allegations of violence or of significant power imbalances which may mean that traditional face-to-face forms of ADR are unsuitable.

6 ODR AND THE REGULATORY FRAMEWORK

An appropriate legal framework is recognized as essential in order to develop domestic ODR.¹⁰¹ Within Australia, there is still an absence of specific legislation and case law that can assist in the ongoing regulation of ODR and e-courts. However, in the current Australian legal context there are some significant e-commerce friendly laws and e-court-related court rules that support the ongoing development of ODR. The Australian Guidelines for Electronic Commerce in 2006¹⁰² (AGEC) also assist to establish an overarching regulatory framework.

6.1 E-Commerce Laws

Instead of having national laws which govern trans-border activities driven by the Internet, there is an e-commerce friendly legal framework to remove some barriers which hinder the development of the e-commerce market in most countries.¹⁰³ These e-commerce friendly legislative instruments are designed to facilitate e-commerce activities. In the international context, the UNCITRAL Model Law on Electronic Commerce (1996) and

¹⁰⁰ See Kaspiew *et al.* (2009), p. 1.

¹⁰¹ – The necessity for providing the required regulatory framework needed for building a truly efficient Information Society. This entails enacting laws that support online activities including: e-signature and information security laws, privacy and data protection laws, cybercrime laws, intellectual property and consumer protection laws etc...;

– Establish ODR pilot projects, especially in developing countries as a practical step to assess the needs of global and local markets, and sustain an open market economy;

See Wahab (2006), p. 9.

¹⁰² Commonwealth of Australia, The Australian Guidelines for Electronic Commerce (AGEC) 2006, <www.treasury.gov.au/documents/1083/PDF/australian_guidelines_for_electronic_commerce.pdf>, last accessed 30 May 2011.

¹⁰³ Electronic Frontiers Australia, Internet Censorship Laws in Australia, <www.efa.org.au/Issues/Censor/cens1.html>, last accessed 30 May 2011; see Parliament of Australia Parliamentary Debates, Australia and the Internet, <www.aph.gov.au/library/intguide/sp/australiainternet.htm>, last accessed 30 May 2011.

the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) can be cited as some promising examples.¹⁰⁴

In the Australian context, there are several legislative developments that more generally support e-commerce and therefore the developing ODR environment. For example, the *Electronic Transactions Act 1999* (Cth) which is mainly focused on providing legal solutions for issues connected with formalities of electronic contracts is a useful legislative example.¹⁰⁵ Patterson, referring to the Act, has succinctly noted “that the Electronic Transactions Act 1999 (Cth) is based on two fundamental principles: ‘media neutrality’ and ‘technology neutrality’”.¹⁰⁶ Recently, the *Electronic Transactions Amendment Bill 2010* (Cth) has now been enacted to amend the *Electronic Transaction Act 1999* (Cth) in line with the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).¹⁰⁷

In addition, E-signature law is evolving in the electronic market-driven legal framework.¹⁰⁸ Blythe suggests that the adoption of e-signature law in the world groups into three categories: Prescriptive Law, Hybrid Models, and “Minimalist” Laws.¹⁰⁹ In addition, admissibility of electronic records before the Courts can be considered as a positive step for the development of Australian e-commerce market and dispute resolution mechanism system.¹¹⁰

104 Secretariat, United Nations Commission on International Trade Law Forty-third session New York, Possible future work on online dispute resolution in cross-border electronic commerce transactions, *Note*, (2010), p. 13, <www.odrandconsumers2010.org/wp-content/uploads/2010/06/UN-Commission-Secretariat-Note.pdf>, last accessed 30 May 2011.

105 “Each State and Territory now has its own *Electronics Transactions Act*. They generally mirror the *Commonwealth Electronic Transactions Act* with occasional small differences in definitions and some additional sections.” Australian Government Attorney-General’s Department, Australia’s legal framework on electronic commerce, <www.ag.gov.au/www/agd/agd.nsf/Page/e-commerce_Australiaslegalframeworkforelectronic-commerce>, last accessed 30 May 2011.

106 “The UNCITRAL model law has provided the basis for the *Electronic Transactions Act 1999* (Cth) and complementary legislation in the States and Territories. This legislation is based on two fundamental principles ‘media neutrality’, which requires that paper-based commerce and e-commerce should be treated equally and ‘technology neutrality’ which seeks to ensure that the law does not discriminate between different forms of technology.” M. Patterson, *E-Commerce Law*, 2001, p. 17, <www.apec.org.au/docs/paterson.pdf>, last accessed 30 May 2011.

107 See <www.comlaw.gov.au/Details/C2011A00033>, last accessed 27 September 2011; see Attorney-General for Australia, R. McClelland, *Electronic Transaction Laws to Be Improved* (2010), <www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_7May2010-ElectronicTransactionLawstobeImproved>, last accessed 27 September 2011.

108 See Patterson (2001); see S.E. Blythe, “Digital Signature Law of the United Nations, European Union, United Kingdom and United States: Promotion of Growth in E-Commerce with Enhanced Security”, *Richmond Journal of Law & Technology*, (2005) Vol. XI, No. 2, pp. 17-18.

109 Blythe (2005), pp. 17-18.

110 See P.L.G. Brereton, “Evidence in Civil Proceedings: An Australian Perspective on Documentary and Electronic Evidence”, Speech to the National Judges College of the Supreme People’s Court of The People’s Republic of China (2007), <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_brereton0907>, last accessed 12 June 2011.

The importance of these developments is that there is a generally accepted legal framework to improve online business and remove several barriers which exist in the national and international legal arena. These regulatory responses are not static and are evolving to support e-commerce which can include the resolution of disputes which arise from Business to Business, Business to Customer, Customer to Customer, and Customer to Business relationships.¹¹¹

6.2 Recent Legislative Developments

The development of online commercial arbitration within Australia is also supported by the recent *International Arbitration Amendment Act 2010* (Cth) (IAAA).¹¹² One of the amendments involved the removal of an “in writing” requirement of arbitration agreements embedded in the *International Arbitration Act 1974* (Cth), which hindered the formation of online arbitration agreements as a legally valid agreement. The new IAAA which was brought in line with the amendments to the 1985 UNCITRAL Model Law on International Commercial Arbitration in 2006¹¹³ enables contracting parties to make an International arbitration agreement in electronic form as well.¹¹⁴

The second legislative development is the enactment of the *Competition and Consumer Act 2010* (Cth) (Formally known as the *Trade Practices Act 1974* (Cth)).¹¹⁵ The *Competition and Consumer Act 2010* (Cth), has been designed to establish a uniform consumer protection legal framework and includes some language which introduces new provisions in regards to the fairness of contractual clauses.¹¹⁶ This law applies in both offline and online contexts.¹¹⁷ In this sense, online consumer arbitration clauses which are incorporated in

111 See Types of E-Commerce Relationships, <www.sqa.org.uk/e-learning/ECIntro01CD/page_01.htm>, last accessed 27 September 2011.

112 *International Arbitration Amendment Act* No. 97 2010 (Cth), <www.austlii.edu.au/au/legis/cth/num_act/iaaa2010356.txt/cgi-bin/download.cgi/download/au/legis/cth/num_act/iaaa2010356.rtf>, last accessed 30 May 2011.

113 1985 – UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>, last accessed 30 May 2011.

114 *International Arbitration Amendment Act* No. 97 2010 (Cth).

115 “On 1 January 2011 the *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010*.” Australian Competition & Consumer Commission, Welcome to the ACCC, <www.accc.gov.au/content/index.php/itemId/142>, last accessed 30 May 2011.

116 M. Shelly and M. Jackson, “Doing Business with Consumers Online: Privacy, Security and the Law”, *International Journal of Law and Information Technology*, (2009) Vol. 17, No. 2, pp. 180-188, <<http://ijlit.oxfordjournals.org/content/17/2/180.full#fn-38>>, last accessed 30 May 2011.

117 “Consumer protection legislation applies equally whether the sale occurs face to face, by telephone or over the Internet.” *Id.*, p. 188; see Australian Government Productivity Commission, Review of Australia’s Consumer Policy Framework, *Productivity Commission Inquiry Report*, (2008) Vol. 2, No. 45, p. 312, <www.pc.gov.au/__data/assets/pdf_file/0008/79172/consumer2.pdf>, last accessed 30 May 2011.

a B2C e-commerce contractual relationship will also be affected.¹¹⁸ This new legal scheme has implications in respect of ODR B2C arbitration clauses as the legal validity of an arbitral clause contained in a business to consumer agreement may depend on the fairness of the arbitral clause. For example, the legal validity of mandatory consumer arbitration clauses can be questioned under this law if such clauses are unfair and they are incorporated in standard form contracts.¹¹⁹ There is a list of situations which can be considered as unfair terms, for example, section 25(k) of *Competition and Consumer Act 2010* (Cth) stipulates that a contractual term is unfair if it “limits, or has the effect of limiting, one party’s right to sue another party”.¹²⁰

6.3 *The Australian Guidelines for Electronic Commerce*

There are other regulatory frameworks which apply and support the broader ODR environment. For example, Australian Guidelines for Electronic Commerce illustrates the Australian commitment towards the promotion of self-regulation and provide a policy framework which is specifically focused on B2C e-commerce arena.¹²¹ The Australian government conducted a review in 2003¹²² and introduced a new model in 2006 as part of the ongoing effort towards reviewing the existing policy framework.¹²³ The 2006 model applies to the B2C e-commerce policy framework and the B2C electronic commerce platform.¹²⁴

Again, overarching global approaches have also influenced policy approaches in this arena. For example, AGECE can be considered as the fulfilment of the obligations embedded in Guidelines for the Consumer Protection in the Context of Electronic Commerce 1999

118 Redchip lawyers, *New Consumer Protection Legislation*, 2010, Paper, <www.redchip.com.au/news/new-consumer-protection-legislation>, last accessed 30 May 2011.

119 See sections 23, 24 and 25 of Volume 3, Schedule 2, Part 2-3, of the *Competition and Consumer Act 2010* (Cth), <www.austlii.edu.au/au/legis/cth/consol_act/caca2010265.txt>, last accessed 30 May 2011; see Redchip lawyers (2010).

120 *Competition and Consumer Act 2010* (Cth).

121 Australian Government, Treasury Department, *Review of Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business* Discussion Paper, Expert Group on Electronic Commerce (2003), <www.ecommerce.treasury.gov.au/bpmreview/content/discussion.asp?NavID=5>, last accessed 12 June 2011.

122 Australian Government, Treasury Department, Discussion Paper, Expert Group on Electronic Commerce (2003).

123 See AGECE 2006.

124 *Id.*; according to the Guideline 7, B2B means “business-to-business electronic commerce” B2C means “business-to-consumer electronic commerce”. Guideline 8 articulates that “The Guidelines apply to B2C electronic commerce. However, businesses are encouraged to follow the Guidelines when engaging in B2B electronic commerce.” Further, Article 9 states that “The Guidelines do not apply to transactions between individuals both acting in a non-business capacity”.

developed by Organisation for Economic Co-operation and Development (OECD).¹²⁵ Moreover, it seems that the ODR-related standards are an extension of the ADR-related principles in countries including Australia where these standards are recognized as part of an international effort to regulate ODR.¹²⁶ Most importantly, the Australian regulatory approach to electronic consumer protection policies are largely designed in the broader context of e-consumer protection which is linked to national consumer protection laws.¹²⁷

Clearly the broad objective of AGEC is to provide a framework for the development of B2C e-commerce activities. Overall, the rationale behind these guidelines is to enhance consumer confidence in B2C electronic commerce by providing guidance to businesses. There are several objectives which include: fair business practices, accessibility and disability access, advertising and marketing, engaging with minors' "disclosure of a business's identity and location", "disclosure of a contract's terms and conditions", "the implementation of mechanisms for concluding contracts" adopting privacy principles, using and disclosing information about payment, security and authentication mechanisms, the establishment of fair and effective procedures for handling complaints and resolving disputes, and the law and forum for the resolution of contractual disputes.¹²⁸

There are three major features that support ODR that are embedded in the framework of the Australian AGEC and standards developed by NADRAC in terms of the regulation of disputes resolution mechanisms. First, AGEC provides specific guidelines applicable to B2C e-commerce activities including principles applicable to appropriate dispute resolution mechanisms for the resolution of B2C e-commerce disputes.¹²⁹

Second, the preservation of traditional judicial redress is expressly recognized. Both internal and external complaint-handling mechanisms do not override a consumer's right to seek judicial redress. AGEC reflects the underlying rationale behind the Australian consumer laws where right of access to court is preserved. However, ODR is also considered and Cortes notes that:

It posits that justice should be understood as the right to obtain redress through the most suitable mechanism, which for many disputes, such as those arising

125 OECD Guidelines for the Consumer Protection in the Context of Electronic Commerce (1999), <www.oecd.org/document/50/0,3343,fr_2649_34267_1824435_1_1_1_1,00.html>, last accessed 30 May 2011.

126 NADRAC, A Framework for ADR Standards (2001), <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_FrameworkforADRStandards>, last accessed 30 May 2011.

127 The existing the Best Practice Model in Australia has been designed in light of the Commonwealth Consumer Protection Laws – "the Model is underpinned by Commonwealth consumer protection laws". Approaches to Consumer Protection within the APEC Region, Report of the Electronic Commerce Steering Group (2002), p. 8, <www.nacpec.org/docs/Approaches_to_consumer_protection.pdf>, last accessed 30 May 2011.

128 See AGEC 2006.

129 *Id.*; see M. Park, "E-Commerce and ADR: Some Suggestions", *ADR Bulletin*, (2002) Vol. 5, No. 6, Article 4.

from e-commerce, may well be ODR, and not as the right to participate in an adversarial judicial process. It is necessary to clarify the extent to which courts can require participation in a mediation process or enforce its results.¹³⁰

From the perspective of online consumers, the consumer may use facilitative ADR options (negotiation, mediation and conciliation) or may use courts. Arbitration is not ordinarily considered in this context. However this approach must be considered within the context of the broad external dispute resolution (EDR) system that operates in respect of many disputes within Australia. Initially many external dispute resolution schemes or industry-based schemes were directed at disputes in respect of consumer relationships rather than general business relationships. In the financial sector for example, it has been estimated that more than 250,000 consumers per year rely upon industry based ADR schemes to resolve disputes that they may have with banks, insurance providers and others. Most schemes have also been directed at “resolution” rather than prevention or handling.

These external dispute resolution schemes have been set up in various industries to provide low cost (or free to the consumer), effective and relatively quick means of resolving consumer complaints about products and services. The schemes are often funded by a cooperative of industry members (examples include the Telecommunications Industry Ombudsman, the Financial Ombudsman Service Limited (FOS), and the Credit Ombudsman Service Limited (COSL). and are intended to deal with disputes between business and consumers. Generally, the scope of these schemes is limited in that they do not deal with internal disputes or disputes with contractors, suppliers or other business entities.

Ombudsman schemes such as Telecommunication Industry Ombudsman (TIO) and Financial Ombudsman Service (FOS) play a pivotal role in the resolution of consumer disputes which emerge between consumers and some industries and each make use of some forms of ODR.¹³¹

The Telecommunication Industry Ombudsman operates under the legal basis of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).¹³² The dispute resolution conducted by the TIO is guided by the Benchmarks for Industry-Based

130 P. Cortes, “Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues”, *Rutgers Computer and Technology Law Journal*, (2008) Vol. 35, No. 1, pp. 3-4.

131 “Some industries including the telecommunications, financial services, energy, water and insurance industries provide free complaints services through an ombudsman or an independent dispute resolution scheme. Some industries have a national ombudsman (such as the Telecommunications Industry Ombudsman and the Financial Industry Ombudsman) but other industries (such as energy) have an ombudsman or dispute resolution office in each state and territory.” Australian Competition and Consumer Commission, How to resolve a problem, <www.accc.gov.au/content/index.phtml/itemId/815327>, last accessed 11 June 2011.

132 Telecommunications Industry Ombudsman, About the TIO, <www.tio.com.au/policies/indexa.htm>, last accessed 30 May 2011.

Customer Dispute Resolution Schemes which has been introduced by the Australia Government (The Department of Industry Science and Tourism in 1997).¹³³ Principles such as accessibility, independence, fairness, Accountability, efficiency and effectiveness are recognised as the benchmarks. In line with these principles, TIO resolves problems about telephone, mobile phone, and Internet services, for the lodgement of complaint. In the process of dispute resolution, diverse methods of communication are used. The most interesting IT-related techniques are online complaint mechanisms; the TIO website allows online complaint forms to be lodged for consumers who have access to the Internet service (calling, faxing, online complaint, posting, contacting via interpreter, TTY machine or National Relay Service or in person).¹³⁴

However, it is not clear as to what types of ODR mechanisms are used and how much information and communication technology is utilised in the process of dispute resolution and enforcement of outcomes of the scheme.¹³⁵ In addition, the scope of the jurisdiction is limited to Australia.¹³⁶ However, it seems that ADR can be conducted with the use of appropriate IT and it is probable that the development of ODR mechanisms in the telecommunications sector will occur rapidly into the future.¹³⁷

The Financial Ombudsman Service (FOS)¹³⁸ was introduced after merging three major industry dispute resolution bodies the Financial Industry Complaints Service (FICS), Banking and Financial Services Ombudsman (BFSO) and Insurance Ombudsman Service (IOS).¹³⁹ FOS is considered to be a single national service which has the power to resolve disputes relating to banking, insurance and investment in Australia.¹⁴⁰ As far as the use of

133 Telecommunications Industry Ombudsman, About the TIO.

134 Telecommunications Industry Ombudsman (TIO), Ways to make a complaint to the TIO, <www.tio.com.au/make_a_complaint.htm>, last accessed 11 June 2011; see "Complaints to the TIO can be made online or by phone, fax, email, in writing, via TTY or in person", Telecommunications Industry Ombudsman, About Us, <www.tio.com.au/about_tio.htm>, last accessed 11 June 2011.

135 See Hybrid dispute resolution processes such as education for self advocacy, referral, facilitation, investigation and determinative resolution are used by TIO for the resolution of disputes. Telecommunications Industry Ombudsman, Standard Resolution Methods and Outcomes, <www.tio.com.au/policies/indexb/standard_resolution_methods_and_outcomes.htm>, last accessed 30 May 2011.

136 TIO.

137 R.R. Bruce, R. Macmillan, Debevoise & Plimpton, T. Ellam, H. Intven, T. Miedema & M. Tétrault LLP, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, Discussion Paper 2004, p. 4, <www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf>, last accessed 11 June 2011.

138 Financial Ombudsman Service, <www.fos.org.au/centric/home_page.jsp>, last accessed 30 May 2011.

139 "The BFSO was merged with the Financial Industry Complaints Service (FICS) and Insurance Ombudsman Service (IOS) to form the national Financial Ombudsman Service (FOS) on 1 July 2008." Australian Competition and Consumer Commission (ACCC), <www.accc.gov.au/content/index.phtml/itemId/287873/fromItemId/815972/quickLinkId/816518/whichType/org>, last accessed 30 May 2011.

140 "The Financial Ombudsman Service (FOS) takes complaints on a wide range of financial services and consolidates a number of financial services ombudsman and dispute resolution schemes to provide a single national service for banking, insurance and investment disputes in Australia." Australian Competition and Consumer Commission (ACCC), <www.accc.gov.au/content/index.phtml/itemId/>

ODR techniques is concerned consumers are allowed to make a complaint by using an online lodgement facility.¹⁴¹

The schemes face some issues as decisions can be made that are binding on industry members but not consumers.¹⁴² However, the vast majority of disputes are resolved by these schemes and when determinations are made they are likely to be complied with (they are binding on members – for example, banks etc).¹⁴³

The processes used in such schemes vary, however they are often focussed on complaints handling and conciliation.

AGEC has a general application to some area of B2C e-commerce activities and it is not designed specifically for ODR. In this sense, the guidelines can be applied to a range of dispute resolution mechanisms that can be defined as ADR or ODR. The application of the AGECE rules to ODR mechanisms is important to consider in this context. There are several important principles operating in these guidelines which ensure fair and effective dispute resolution mechanisms for the resolution of B2C e-commerce disputes. From a broader perspective of the protection of online consumers, it seems that these guidelines recognize three major dispute resolution avenues: internal dispute resolution; external dispute resolution; and right of the consumers to seek redress from courts.¹⁴⁴ Indeed, business are obliged to set up internal complaint-handling mechanisms in compliance with principles such as “within a reasonable time”, “in a reasonable way”, “free of charge to the consumer”; and “without prejudicing the rights of the consumer to seek legal redress”. External dispute resolution mechanisms should be “accessible”, “independent”, “fair”, “accountable”, “efficient”, “effective” and “without prejudice to judicial redress”.¹⁴⁵

Despite the positive elements of AGECE mentioned above, it is possible that the broader objectives of AGECE may be undermined by the lack of certainty in respect of the definition of appropriate dispute resolution mechanisms for the resolution of B2C e-commerce disputes. Arguably, it provides an imperfect blueprint for the development of a B2C e-commerce friendly dispute resolution mechanism, internationally and nationally. There are some specific issues that may require attention into the future to ensure that the domestic framework responds to ODR effectively. One particular issue is that ODR mechanisms within EDR schemes may not produce precedent and may therefore have the capacity to reduce certainty.

Parties to any dispute resolution mechanism should be able to understand the rights based framework as well as interest based issues and be able to predict the consequences

287873/fromItemId/815972/quickLinkId/816518/whichType/org>, last accessed 30 May 2011.

141 Financial Ombudsman Service, <www.fos.org.au/centric/home_page/resolving_disputes/how_to_lodge_a_dispute.jsp>, last accessed 30 May 2011.

142 NADRAC 2001, p. 22.

143 *Id.*

144 See AGECE 2006.

145 *Id.*

of going through an ADR mechanism. However, the flexible nature of principles and the self-regulatory principles or standards may lead to a lack of consistency and predictability. Even the wording of the guidelines can be misleading and confusing. For example, principles or guidelines that refer to concepts such as “fair, reasonable, disputant friendly and accessible” may have very flexible meanings.

This issue of common data parameters and reporting is also an issue that is currently the subject of Federal government action. Unfortunately much of what happens in the civil justice setting is not known as different courts and agencies collect different information and data. This hampers ODR development because ODR innovation may not be the subject of evaluation or reporting. At the Federal level the government is actively using newer technologies to monitor and evaluate the existing formal and informal dispute resolution system, and defining parameters, objectives, and key performance indicators that will hopefully assist with ODR growth into the future.

As far as the legal situation of AGECE is concerned, the following principles of AGECE highlight the reliance of online consumer protection through existing national laws.

11. The Guidelines are not a replacement for consumer protection laws or codes of conduct. Complying with the Guidelines does not exempt a business from compliance with obligations under such laws or codes.
12. Every effort has been made to avoid inconsistencies with existing laws. However, if there is an inconsistency, the law has precedence over the Guidelines.
13. Some parts of the Guidelines reflect legal requirements. Businesses should not rely on the Guidelines as a definitive statement of these requirements. Also, not all legal requirements relevant to electronic commerce are reflected in the Guidelines.¹⁴⁶

One reason behind this consumer protection approach is to avoid a regulatory overlap between these guidelines and national consumer protection laws in Australia. In addition, the reality is that few consumer matters are the subject of litigation within Courts. Svantesson and Clarke have noted that “few consumer disputes are suitably handled by the legal system” due to the small value of transactions, complexities and cost.¹⁴⁷ They also observe that “a consumer’s right to seek redress is an important incentive to businesses to not try to avoid their responsibilities”¹⁴⁸ and they add that “consumers must always have a realistic avenue for taking legal action against the seller, as the existence of such avenues

¹⁴⁶ *Id.*

¹⁴⁷ D. Svantesson and R. Clarke, *A best practice model for e-consumer protection*, Bond University Page of Dan Svantesson 2010, Paper, p. 11, <works.bepress.com/dan_svantesson/36>, last accessed 27 September 2011.

¹⁴⁸ *Id.*

puts pressure on the e-retailers to not simply ignore consumer complaints".¹⁴⁹ One unanswered question in the current framework that becomes more and more relevant as consumer transactions increase outside the jurisdiction of Australia is how online consumers can take action against powerful and dominant online business interests that are located in other jurisdictions.

In considering the application of these guidelines to the enforcement of OCA, it is suggested that the guidelines are too broad and lack sufficient specificity in terms of addressing the issues connected with online consumer arbitration. For example, in terms of mandatory B2C arbitration clauses and enforcement of online consumer arbitration clause, the guidelines have arguably omitted issues such as business to consumer mandatory arbitration clauses and online consumer arbitration clauses. Instead, regulation of these issues has been left to the private online sector.

Another problem is the lack of appropriate enforcement mechanisms in regards to OCA. There is a lack of an appropriate self-regulatory approach to strengthen the enforcement of online arbitration in general or online consumer arbitration awards in particular. In terms of the issues of enforcement of OCAA in the context of the above guidelines, the lack of provisions of appropriate enforcement mechanisms for the enforcement of OCAA may contradict the objectives of these initiatives. It is unclear why appropriate guidelines were not introduced in the 2006 AGEC in line with the developments taking place in the field of resolution of B2C e-commerce context. Unfortunately, the issue of enforcement of outcome of the dispute resolution mechanisms remains a major issue in respect of the resolution of B2C e-commerce dispute resolution sector. From a dispute resolution perspective, it is evident that the primary focus has been upon the dispute resolution mechanisms rather than the broader and more complex issues of applicable law, jurisdiction and enforcement of final outcomes of dispute resolution providers.

7 CONCLUSION

It is clear that the spread of the use of ODR techniques in Australia has extended into a variety of fields and is likely to extend significantly in future years. With the development of new technologies, the extension of old technologies, an awareness of the benefits of the ODR, and new legal paradigms it is likely that ODR will continue to be viewed and will become viable ADR processes for the prevention, education, facilitation, and resolution of disputes. The ODR-related developments discussed above provide interesting examples which highlight the commitment towards the development of ODR as an effective ADR

¹⁴⁹ *Id.*

mechanism in Australia and the potential ODR can offer in terms of resolution of disputes in various sectors.

However, there are some areas where more attention will be required to support the development of ODR. For example; there is a lack of attention towards the integration of private ODR and the eCourt strategies. There is no specific legal framework which deals with issues associated with online dispute resolution in general and online consumer arbitration. Moreover, despite some developments in several areas of ODR it is fair to say that development remains “patchy” and it is questionable whether the ODR related developments have a strong focus on the resolution of business to consumer cross border online disputes. Whilst ODR in Australia is developing and developing quickly, a more strategic framework approach would support this development further. In addition, a greater capacity to recognise, replicate and extend sound innovative ODR experimentation is essential to ensure that promising innovative developments continue to take place in the Australian environment.



22 ONLINE DISPUTE RESOLUTION IN ASIA

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Asia is a rich and major continent that has excelled in the utilization of ICTs. Whilst many Asian States merit a mention, this chapter shall focus on China, Japan and India as major ODR players in the Asian continent.

The choice of such three states is not only due to their international standing and weight, but also due to the progressive and accelerated development in the invention and implementation of ICT applications, which certainly impacts the development of ODR schemes.

On such account, the chapter shall be divided into three parts; each part shall be devoted to assess the *status quo* of ODR in one of the three distinguished states, which have three of the highest Internet and mobile phone usage rates in the world.

For example, China has emerged as one of the largest e-commerce giants with more than 457 million Internet users and 277 millions mobile phone Internet users.¹ In Japan, a White Paper entitled “Basic IT Strategy”, released in August 2000 by the Ministry of International Trade and Industry (MITI), has revealed Japan’s ambition to expand its IT infrastructure in support of not only the development of e-commerce, but the eventual implementation of e-Government initiatives.

1 ODR IN CHINA²

The history of the Internet application in China is not very long. The first email sent out by Prof. Tianbai Qian on 20 September 1987 signaled the start of the Internet use in China.³ Since then, China entered the Internet era and made remarkable achievements in the development and application of the modern information technology. Chinese Internet population achieved the highest number in the world within a short period of time. As of June 2011, China has 485 million Internet users.⁴

1 The 27th Statistical Report on Internet Development in China, CNNIC, December 2010, available at <www.cnnic.cn/dtygg/dtgg/201101/P020110119328960192287.pdf>, last accessed 11 March 2011.

2 This part is prepared by Dr. Yun Zhao, Associate Professor, Faculty of Law, University of Hong Kong.

3 Evolution of Internet in China, available at <www.edu.cn/introduction_1378/20060323/t20060323_4285.shtml>, last accessed 11 January 2011.

4 The 28th Statistical Report on Internet Development in China, CNNIC, July 2011, available at <www.cnnic.cn/research/bgxz/tjbg/201107/P020110721502208383670.pdf>, last accessed 23 September 2011.